

1 **RYLEY CARLOCK & APPLEWHITE**

One North Central Avenue, Suite 1200

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4 Lisa S. Wahlin (Bar No. 013979)

lwahlin@rcalaw.com

5 *Attorneys for Defendants*

6 **UNITED STATES DISTRICT COURT**

7 **FOR THE DISTRICT OF ARIZONA**

8 Jennifer Marie Jones,

9 Plaintiff,

10 v.

11 Town of Quartzsite; Jeffrey Gilbert and
12 Sondra Gilbert, Husband and Wife; Officer
Rick Paterson, #43; Officer Xavier Frausto,
13 #15, and Terry Frausto, Husband and Wife;
Denise Ann Florian; Individual Does I-X,

14 Defendants.
15

Case No. 2:12-cv-2629-PHX-LOA

**MOTION TO DISMISS FOR
FAILURE TO PROSECUTE**

16 Pursuant to Rule 41(b), Fed. R. Civ. P., Defendants Town of Quartzsite, Gilbert,
17 Paterson, Frausto, and Florian move to dismiss Plaintiff's Complaint because Plaintiff
18 has failed to prosecute her case, including failing respond to a dispositive motion and
19 failing to appear for her deposition, which was rescheduled twice to accommodate her.

20 Rule 41(b), Fed. R. Civ. P., provides that a defendant may move for dismissal of
21 an action when the plaintiff fails to comply with the rules or any order of court. Plaintiff
22 has done both. Plaintiff filed her Complaint on December 10, 2012, and has since done
23 little to pursue her claims. First, Plaintiff failed to comply with this Court's order
24 requiring her to file a written election consenting to a magistrate judge or electing a
25 district judge. (Docs. 3, 4). Next, Plaintiff failed to file proof of service of the Complaint,
26 causing this Court to issue a second order to show cause. (Doc. 7). Because of Plaintiff's
27 counsel's failure to file for *pro hac vice* admission, the Court issued yet another order to
28

1 show cause, and the scheduling conference was twice rescheduled. (Docs. 26, 29, 30, 35).

2 During the scheduling conference, the Court advised Plaintiff's counsel that the
3 Complaint did not state a claim, at least as to certain defendants and claims, and strongly
4 suggested to Plaintiff's counsel that he amend the Complaint to state a claim to avoid a
5 dismissal. The Court allowed Plaintiff's counsel to choose the deadline for amending the
6 Complaint. Plaintiff's counsel chose November 1, 2013 but Plaintiff never amended the
7 Complaint.

8 On October 2, 2013, after conferring with Plaintiff's counsel, Defendants noticed
9 Plaintiff's deposition for December 12, 2013. (Doc. 43). On December 10, counsel for
10 Defendants emailed Plaintiff's counsel to confirm that Plaintiff would be appearing for
11 her deposition.¹ See December 10, 2013 email exchange, attached as Exhibit 1. Plaintiff's
12 counsel indicated that he was planning to file a Motion to Withdraw and asked for the
13 deposition to be rescheduled. See Exhibit 1. That same day, Defendants filed an amended
14 notice of deposition, rescheduling Plaintiff's deposition for January 22, 2014. (Doc. 44).

15 On January 21, 2014, counsel for Defendants emailed Plaintiff's counsel, who still
16 had not filed a Motion to Withdraw, to confirm Plaintiff's deposition scheduled for the
17 next day. Plaintiff's counsel called Defendant's counsel, and then followed up with an
18 email, canceling the deposition because Plaintiff's car was in disrepair. See January 21,
19 2014 email exchange, attached as Exhibit 2. On January 22, 2014, Defendants filed a
20 notice rescheduling Plaintiff's deposition for March 3, 2014. (Doc. 47). Plaintiff failed to
21 appear for her deposition on March 3, 2014. See Affidavit of Non-Appearance, attached
22 as Ex. 3.

23 Additionally, Defendants filed a Motion for Judgment on the Pleadings on January
24 14, 2014. (Doc. 45). The Court issued an order giving Plaintiff until February 18, 2014 to
25 respond to the motion. (Doc. 46). Plaintiff failed to file a response.

26
27 ¹ Defendant's counsel contacted Plaintiff's counsel because she had other cases with
28 Plaintiff's counsel from which he was withdrawing as counsel, and suspected the
deposition might not go forward.

1 In sum, over the course of this case, Plaintiff has repeatedly ignored the rules and
2 various court orders and has made virtually no effort to prosecute her case—from failing
3 to amend a deficient complaint, to failing to respond to a dispositive motion, to failing to
4 appear for a deposition that was twice rescheduled to accommodate her.

5 The Ninth Circuit has held that courts must weigh five factors in determining
6 whether to dismiss a case pursuant to Rule 41(b): (1) the public interest in expeditious
7 resolution of the litigation; (2) the court’s need to manage its docket; (3) the risk of
8 prejudice to the defendants; (4) the policy favoring disposition of cases on the merits; and
9 (5) the availability of less drastic alternatives.² Here, the balance of these factors weighs
10 in favor of dismissal.

11 The first and second factors—the public’s interest in expeditious resolution of
12 litigation and the court’s need to manage its own docket—weigh in favor of dismissal.
13 The public interest in expeditious resolution of litigation always favors dismissal.³ The
14 public interest is certainly not advanced where, as here, a plaintiff fails to respond to
15 motions, fails to respond to court orders, and fails to engage in discovery. And with
16 respect to the second factor, the Ninth Circuit has recognized that it must “preserve the
17 district courts’ power to manage their dockets without being subject to the endless
18 vexatious non-compliance of litigants.”⁴ This case has been pending for 15 months and
19 remains unresolved, largely because of Plaintiff’s lack of participation.

20 The third factor also favors dismissal. “A defendant suffers prejudice if the
21 plaintiff’s actions impair the defendant’s ability to go to trial or threaten to interfere with
22 the rightful decision of the case.”⁵ Plaintiff’s failure to respond to discovery, to motions,
23 and to the Court’s orders has caused delay, impacted Defendants’ ability to adhere to

24 ² *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992).

25 ³ *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999).

26 ⁴ *Id.* at 1261; *Link v. Wabash Railroad Co.*, 370 U.S. 626, 629-30 (1962) (a court’s
27 authority to dismiss for lack of prosecution is necessary to prevent undue delays in the
disposition of pending cases and to avoid congestion in the district courts’ calendars).

28 ⁵ *In re Phenylpropanolamine Products Liability Litig.*, 460 F.3d 1217, 1227 (9th Cir.
2006).

deadlines, and caused Defendants to incur additional costs and expenses defending this action.

The fourth factor weighs against dismissal, but only slightly. Generally the public policy favoring disposition of cases on their merits weighs strongly against dismissal.⁶ But this factor “lends little support to a [plaintiff] whose responsibility it is to move a case toward disposition on the merits but whose conduct impedes progress in that direction.”⁷ Plaintiff has done little to move this case forward. And her failure to respond to Defendants’ dispositive motion signals her disinterest in protecting her claims and moving them toward a resolution on the merits.

Although the Court could order sanctions or issue another order to show cause, the Court has already ordered issued several orders to show cause and still Plaintiff has been dilatory. It seems unlikely that Plaintiff will respond to any further orders.

Accordingly, Defendants ask this Court to dismiss Plaintiff's claims for failure to prosecute.

.DATED this 12th day of March, 2014.

RYLEY CARLOCK & APPLEWHITE

By /s/ Lisa S. Wahlin
Lisa S. Wahlin
One North Central Avenue, Suite 1200
Phoenix, AZ 85004-4417
Attorneys for Defendants

⁶ *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998).

⁷ *In re Phenylpropanolamine* at 1228.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on March 12, 2014, I electronically transmitted the foregoing
3 document to the Clerk's Office using the CM/ECF system for filing and transmittal of
4 Notice of Electronic filing to the following CM/ECF registrants:

4 Elmer Stewart Rhodes III
5 Law Office of Elmer Stewart Rhodes
6 432 E Idaho St., Ste. C231
7 Kalispell, MT 59901
8 *Attorney for Plaintiff*

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24
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27
28
/s/ Darlene Dahl

EXHIBIT 1

Wahlin, Lisa S.

From: Wahlin, Lisa S.
Sent: Tuesday, December 10, 2013 9:29 AM
To: rhodeslegalwriting@gmail.com
Subject: Jones v. Town of Quartzsite, et al.; deposition of Jennifer Jones

Importance: High

Stewart,

Are you withdrawing from Ms. Jones' case as well? Is her deposition going forward on Thursday?
Please advise.

Thanks,
Lisa

RYLEY CARLOCK
& A P P L E W H I T E
Attorneys

Lisa S. Wahlin
Of Counsel

Ryley Carlock & Applewhite

One N. Central Avenue, Suite 1200, Phoenix, AZ 85004

Phone (602) 440-4892 | Fax (602) 257-6992 | lwahlin@rcalaw.com

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Wahlin, Lisa S.

From: rhodeslegalwriting@gmail.com
Sent: Tuesday, December 10, 2013 9:33 AM
To: Wahlin, Lisa S.
Subject: Re: Jones v. Town of Quartzsite, et al.; deposition of Jennifer Jones

Yes, I will be filing to withdraw from her case as well. Can we reschedule her for the same day in January as Michael, or that same week? If so, let me know what day you prefer for her.

Thanks,

Stewart

On Tue, Dec 10, 2013 at 9:29 AM, Wahlin, Lisa S. <LWahlin@rcalaw.com> wrote:

Stewart,

Are you withdrawing from Ms. Jones' case as well? Is her deposition going forward on Thursday? Please advise.

Thanks,

Lisa

RYLEY CARLOCK
& APPLEWHITE
Attorneys

Lisa S. Wahlin

Of Counsel

Ryley Carlock & Applewhite

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Wahlin, Lisa S.

From: Wahlin, Lisa S.
Sent: Tuesday, December 10, 2013 9:38 AM
To: rhodeslegalwriting@gmail.com
Cc: Maul, Michele A.
Subject: RE: Jones v. Town of Quartzsite, et al.; deposition of Jennifer Jones

Yes. If they could do them on back to back days, as we have them scheduled for now, that would be great. So one of them on 1/22 and the other on 1/23.

Thanks,
Lisa

RYLEY CARLOCK
& A P P L E W H I T E
Attorneys

Lisa S. Wahlin

Of Counsel

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--

Stewart Rhodes
President and Founder of
Oath Keepers
(702) 353-0627

Wahlin, Lisa S.

From: rhodeslegalwriting@gmail.com
Sent: Tuesday, December 10, 2013 9:40 AM
To: Wahlin, Lisa S.
Subject: Re: Jones v. Town of Quartzsite, et al.; deposition of Jennifer Jones

Will do. Whatever date Mr. Roth picks, you can schedule Mrs. Jones for the other.

Thank you,

Stewart

On Tue, Dec 10, 2013 at 9:38 AM, Wahlin, Lisa S. <LWahlin@rcalaw.com> wrote:

Yes. If they could do them on back to back days, as we have them scheduled for now, that would be great. So one of them on 1/22 and the other on 1/23.

Thanks,

Lisa

RYLEY CARLOCK
& A P P L E W H I T E
Attorneys

Lisa S. Wahlin

Of Counsel

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To: Wahlin, Lisa S.
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Thanks,

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Stewart,

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Thanks,

Lisa

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& A P P L E W H I T E
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--
Stewart Rhodes

President and Founder of
Oath Keepers
(702) 353-0627

and more
Stewart Rhodes
President and Founder of
Oath Keepers
(702) 353-0627

EXHIBIT 2

Wahlin, Lisa S.

From: Wahlin, Lisa S.
Sent: Monday, January 20, 2014 8:18 AM
To: rhodeslegalwriting@gmail.com
Cc: Dahl, Darlene
Subject: Jones v. Florian, et al.

Stewart,

I am just confirming that Plaintiff's deposition is still a go for this Wednesday, 1/22/14 at 9:00 a.m.

Thanks,
Lisa

RYLEY CARLOCK
& A P P L E W H I T E
Attorneys

Lisa S. Wahlin
Of Counsel

Ryley Carlock & Applewhite

One N. Central Avenue, Suite 1200, Phoenix, AZ 85004

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Wahlin, Lisa S.

From: rhodeslegalwriting@gmail.com
Sent: Tuesday, January 21, 2014 2:18 PM
To: Wahlin, Lisa S.
Cc: Dahl, Darlene
Subject: Re: Jones v. Florian, et al.

Lisa,

As we discussed on the phone, Jennifer Jones needs to cancel her deposition tomorrow and reschedule it because her car is broken down. She can be available anytime after February 1 - she expects to have her car repaired by then so she can drive to Phoenix and be deposed.

Please let me know what date you would like to reschedule the deposition for.

Thank you,

Elmer Rhodes

On Mon, Jan 20, 2014 at 8:18 AM, Wahlin, Lisa S. <LWahlin@rcalaw.com> wrote:

Stewart,

I am just confirming that Plaintiff's deposition is still a go for this Wednesday, 1/22/14 at 9:00 a.m.

Thanks,

Lisa

RYLEY CARLOCK
& APPLEWHITE
Attorneys

Lisa S. Wahlin
Of Counsel

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--
Stewart Rhodes
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Wahlin, Lisa S.

From: Wahlin, Lisa S.
Sent: Tuesday, January 21, 2014 5:31 PM
To: rhodeslegalwriting@gmail.com
Cc: Dahl, Darlene
Subject: RE: Jones v. Florian, et al.

How about March 3 at 9:00 a.m.?

RYLEY CARLOCK
& A P P L E W H I T E
Attorneys

Lisa S. Wahlin

Of Counsel

602-440-4892

From: rhodeslegalwriting@gmail.com [<mailto:rhodeslegalwriting@gmail.com>]
Sent: Tuesday, January 21, 2014 2:18 PM
To: Wahlin, Lisa S.
Cc: Dahl, Darlene
Subject: Re: Jones v. Florian, et al.

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Elmer Rhodes

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Thanks,

Lisa



Lisa S. Wahlin
Of Counsel

Ryley Carlock & Applewhite

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--

Stewart Rhodes
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(702) 353-0627

EXHIBIT 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jennifer Marie Jones,

Plaintiff,

vs.

Town of Quartzsite; Jeffrey
Gilbert and Sondra Gilbert,
Husband and Wife; Officer Rick
Paterson, #43; Officer Xavier
Frausto, #15, and Terry
Frausto, Husband and Wife;
Denise Ann Florian; Individual
Does I-X,

Defendants.

No.

12-cv-2629-PHX-LOA

REPORTER'S AFFIDAVIT OF NONAPPEARANCE

Phoenix, Arizona

March 3, 2014

9:00 a.m.

REPORTED BY:

Kellie L. Konicke, RPR

AZ Certified Reporter No. 50223

PREPARED FOR:

Superior Court

(Original)



2398 East Camelback Road
Suite 260
Phoenix, Arizona 85016

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F 602.264.2245

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REPORTER'S AFFIDAVIT OF NONAPPEARANCE

I, KELLIE L. KONICKE, RPR, do hereby
declare as follows:

That pursuant to the request of Lisa S.
Wahlin, Esq., of Ryley Carlock & Applewhite,
One North Central Avenue, Suite 1200, Phoenix, Arizona,
on March 3, 2014, at 10:00 a.m., for the purpose of
placing under oath and reporting the deposition of
Jennifer Marie Jones; that there was present Lisa S.
Wahlin, Esq., of Ryley Carlock & Applewhite, attorney
for Defendants; and Kellie L. Konicke, RPR, Griffin &
Associates;

That the above-mentioned attorney and the
reporter remained at the address indicated until
approximately 9:30 a.m., by which time the
aforementioned had not appeared for the purpose of
having a deposition taken.

I declare under penalty of perjury that
the foregoing is true and accurate dated this 7th day of
March, 2014.


Kellie L. Konicke, RPR
AZ Certified Reporter
Certificate No. 50223